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CONSERVATION, CONSULTATION, AND CAPACITY: STATE VIEWS ON THE
NEED TO MODERNIZE THE ENDANGERED SPECIES ACT

Wednesday, May 10, 2017

United States Senate

Committee on Environment and Public Works

Washington, D.C.

The committee met, pursuant to notice, at 10:37 a.m. in room 406, Dirksen Senate Office Building, the Honorable John Barrasso [chairman of the committee] presiding.

Present: Senators Barrasso, Carper, Inhofe, Capito, Wicker, Fischer, Rounds, and Ernst.

Senator Barrasso. Good morning. I call the Environment and Public Works Committee to order and like to defer to the Ranking Member, Senator Carper.

STATEMENT OF THE HONORABLE THOMAS R. CARPER, A UNITED STATES
SENATOR FROM THE STATE OF DELAWARE

Senator Carper. I thank the Chairman.

I apologize to our witnesses, some of whom have come quite a distance. The Democratic leader in the Senate has called for an emergency caucus meeting to discuss the issues leading up to the dismissal of James Comey as our FBI Director and to discuss how we might move quickly to ensuring that a special prosecutor is assigned and put to work right away.

If I have the opportunity to return at the end of our caucus meeting, I will come back, and perhaps some of my colleagues will as well.

I really appreciate the Chairman's understanding of this and give me a chance to give the opening statement first.

Good to see you all. Thank you. This is important stuff.

I am very interested, and I know my colleagues are, to learn more from our State witnesses about your experiences with the Endangered Species Act, the roles that States play, the partnerships that they have cultivated, and the lessons that you have learned, the challenges that you face, and what you think we need to know. I am not sure we could have gathered a more knowledgeable or relevant panel. Altogether, our witnesses represent nearly a century of natural resource, environmental, as well as fish and wild, experience, which leads me to believe

you must have started very early in your lives.

This is our second Endangered Species Act hearing this year. I would like to emphasize a couple points that struck me from our first hearing on this very important issue. The first is that the world is experiencing an exponential increase of species in peril. The International Union for the Conservation of Nature has declared that almost one-third of all known species of plants and animals, some 22,000-plus species, are currently at risk of extinction.

The second is that there are so many species ending up on the endangered list. If, as we will hear from our witnesses today, States are concerned about and equipped to handle species conservation in their States, then why are so many species in trouble? Are there funding challenges? Are there legal challenges?

The Endangered Species Act should be the last backstop against extinction, and the evidence clearly shows that when States, when Federal agencies, when stakeholders collaborate effectively, we can better prevent species from being listed in the first place.

We established at our last hearing that there is generally ample notice that species are at risk. Often, biologists and citizens know years and sometimes even decades in advance that a plant or an animal is in trouble. Governor Freudenthal

disclosed at our earlier hearing that until recently, despite this notice, States really haven't focused on all those non-game species that are struggling and, therefore, their status becomes critical and a source of contention.

The question is, then, are States focusing on them now? How much and with what resources? And how effectively? Hopefully, our State experts here today can help us appreciate the lay of the land and thus help us understand what the Federal Government needs to do to be a better partner to get this critical job done.

I have to say, the numbers are not encouraging. I understand that States spend about a quarter of what the U.S. Fish and Wildlife Service invests to protect Endangered Species Act listed and candidate species. If we include all the Federal agencies spending, the collective State investment is, I think, about four percent. Granted, this likely means we need to invest more in our States. But it also means that States have some soul-searching to do. And if you need the ESA and the Federal agencies to back you up because you will not or cannot carry this burden, then we need to know that.

Congress always intended endangered species protection and restoration to be a joint and collaborative effort among Federal agencies and their State partners, and a host of landowners, along with business interests, and conservationists. Our goal

should be to make sure we are firing on all cylinders given the magnitude of trouble our fellow inhabitants on this planet face today.

I say these things with the greatest of respect, as a recovering governor, for the work that you do and the unique capacity you have to understand the challenges in your States, how best to resolve them, and the partnerships that you need to reach these goals. But in this particular instance you are front and center in a fight not only for State interests, but also a national concern for species that are part of our natural heritage. These plants and animals travel and disperse with little concern for our political boundaries.

If indeed you tell us it is time to modernize this crucial Act, then please let us know how the changes you propose will make all of us better equipped to conserve, to protect, and to restore these plants and critters and places that they call home. This isn't just our legal obligation; I think it is our collective moral duty as well.

Mr. Chairman, I deeply appreciate the chance to go first, and I hope I have a chance to come back and be with all of you a bit later this morning. Thank you so much.

[The prepared statement of Senator Carper follows:]

STATEMENT OF THE HONORABLE JOHN BARRASSO, A UNITED STATES
SENATOR FROM THE STATE OF WYOMING

Senator Barrasso. Thank you very much, Senator Carper. I think, as you know, the Democrats have invoked the two-hour rule. That means this hearing will only go until about 11:30 this morning, which is two hours after the Senate gavelled in. So we will be adjourning at 11:30.

Today, the Environment and Public Works Committee continues its efforts to consider feedback from State officials on the need to modernize the Endangered Species Act.

The Endangered Species Act was enacted in 1973 to conserve species identified as endangered or threatened with extinction, and to conserve the ecosystems upon which those species depend. State governments, particularly their State fish and wildlife agencies, play a central role in fulfilling the Endangered Species Act's mission.

Some have tried to argue that the Federal Government, not the States, is the only entity capable of saving endangered species, and that the States should take a back seat on wildlife conservation for species at risk of extinction. Well, endangered species don't care whether the Federal Government or a State government protects them; they just want to be protected.

Combined, our Nation's 50 State fish and wildlife agencies

are a formidable wildlife conservation machine. Since enactment of the Endangered Species Act almost 45 years ago, State fish and wildlife agencies have enhanced their staff, their expertise, their habitat management techniques, their science capability, their relationships with private landowners and local communities, and political support. And, again, these are the State fish and wildlife agencies.

According to a 2014 to 2015 survey of State fish and wildlife agencies conducted by the Association of State Fish and Wildlife Agencies, our States' wildlife conservation machine is comprised of 50,000 highly trained and highly motivated employees, including 11,000 degreed wildlife biologists, 10,100 law enforcement officers, 6,000 employees with advanced degrees, 2,211 employees solely dedicated to educating and informing the public about wildlife conservation issues. An additional 190,000 volunteers nationwide devote their time and energies to wildlife conservation in support of State agencies.

In recent years, State governments and their State fish and wildlife agencies have increasingly voiced concerns that the Endangered Species Act isn't living up to its conservation potential. So have counties, wildlife managers, homebuilders, construction companies, farmers, ranchers, and other stakeholders.

The Endangered Species Act impacts us all. Ninety-nine

point 4 percent of all the counties in the United States are home to at least one species listed as endangered. That is according to a recent analysis of Fish and Wildlife Service data by the National Association of Counties. So we must all be concerned when the Endangered Species Act isn't living up to its conservation potential.

We are fortunate that national and regional stakeholder groups have already been working for several years in bipartisan ways to identify challenges with the Endangered Species Act and opportunities to make the statute work better.

In March of 2016, the Association of Fish and Wildlife Agencies adopted a set of principles to modernize implementation of the Endangered Species Act, to better promote fish and wildlife conservation, and to better facilitate the participation of landowners and other stakeholders.

In June of 2016, the Democrat and Republican Western Governors' Association unanimously adopted the Western Governors' Association's Endangered Species Act policy under the leadership of Wyoming Governor Matt Mead. The Association of State Fish and Wildlife Agencies, the Western Governors' Association, other bipartisan groups, and individual stakeholders consistently hit on three themes when they discuss ways to modernize the Endangered Species Act.

Conservation. How can the Act better incentivize

conservation activities to, number one, avoid listing of species as endangered or threatened and, number two, recover species when they are listed as endangered or threatened?

Consultation. How can the Act better facilitate the Federal Government's consultation with State and local governments so that decision-making is based on the best available information and State and local capacity is adequately leveraged?

Capacity. How can the Act provide sufficient resources to fulfill the mission of the Act and better allocate those resources to species most in need?

According to feedback from across the Nation and across the political spectrum, modernization of the Endangered Species Act in these areas could lead to better outcomes for imperiled species, for government entities, for private parties and other stakeholders.

So I look forward to hearing more from our witnesses about commonsense, bipartisan opportunities to modernize and strengthen the Endangered Species Act to make it work better for wildlife and for people.

We would now like to hear from our witnesses, starting with Nick Wiley, who is the Executive Director of the Florida Fish and Wildlife Conservation Commission and the President of the Association of Fish and Wildlife Agencies.

Thanks so much for joining us today.

[The prepared statement of Senator Barrasso follows:]

STATEMENT OF NICK WILEY, EXECUTIVE DIRECTOR, FLORIDA FISH AND
WILDLIFE CONSERVATION COMMISSION

Mr. Wiley. Good morning, Chairman Barrasso and Ranking Member Carper and members of the Committee. I appreciate the opportunity to speak with you today. My remarks will represent the views of the Florida Fish and Wildlife Conservation Commission and the Association of Fish and Wildlife Agencies, or AFWA.

My views regarding the Endangered Species Act are shaped by over 31 years of experience as a professional wildlife biologist and a State fish and wildlife agency administrator. During this time, I have been fortunate to work in Florida, where we have an amazing diversity of fish and wildlife resources featuring a number of iconic species that have been benefited from listing under ESA, including bald eagles, manatees, Florida panthers, sea turtles, and American crocodiles.

My direct experience and work with States across the Nation reflect that ESA has served our Nation well as a strong tool for protecting and recovering species that are on the brink of extinction. State fish and wildlife agencies really value and appreciate how ESA has driven many conservation success stories.

We also see firsthand, however, that ESA has not adapted well to the tremendous changes across our Nation's conservation landscape. Federal agencies do not have sufficient capacity or

funding to keep pace with ESA workloads, resulting in delays and litigation.

The ESA is often viewed by private landowners and businesses with great trepidation rather than opportunity for cooperative conservation. It is troubling that the primary purpose for the ESA has shifted over time from an effective focus on rescuing species from the brink of extinction to a broad brush that perpetuates the highest level of Federal regulatory protection even when the threat of extinction has been eliminated and ongoing protection is assured under State management.

State fish and wildlife agency directors generally believe the ESA is not performing as it should and is not sufficiently leveraging State agency expertise and cooperation. We believe there are many areas where ESA should be improved, refocused, and modernized to effectively deal with the scope, scale, and complexity of today's conservation challenges.

When we talk about modernizing ESA, we are talking about improving how ESA is administered and implemented. We are talking about optimizing partnerships with State agencies and better utilizing our growing expertise and conservation capacity. And we are also talking about keeping ESA decisions in the hands of conservation professionals at State and Federal agencies, rather than in the judicial system.

With these concerns in mind, AFWA developed a list of general principles for improving ESA. These principles were developed by State ESA practitioners and calibrated with the Western Governors' Association and the National Governors' Association, reflecting the national scope and significance of ESA. We are hopeful the ideas and recommendations presented in AFWA's general principles will inspire and guide a constructive and collaborative path to a more effective ESA.

Coupled with improving ESA, we also believe that addressing the life needs and habitat requirements of declining species to prevent ESA listing is more prudent and more economically and biologically sound approach to managing species that are otherwise trending toward listing. Through State wildlife action plans, the State agencies have identified species of greatest conservation need and key actions needed to conserve them. We want to continue working with Congress to more fully fund this preventative approach through legislation like the Recovering America's Wildlife Act introduced last Congress.

State fish and wildlife agencies want to be even more value-added in ESA implementation to the degree we each have capacity and funding authority. We are suggesting an opt-in approach that opens doors for the fullest cooperation with State agencies that have or will develop capacity and concurrent authority. We are not suggesting that all 50 States are ready

to fully engage, but many are, if we can get a seat at the table.

Yet, the way ESA is constructed and interpreted, State agencies can be involved in key decisions only at the discretion of Federal agencies. Although Section 6 requires a maximum extent practicable cooperation, this provision has never been fully realized. As the primary trustee for fish and wildlife resources, State agencies should have the option to serve as a full jurisdictional partner in all ESA processes and decisions, as originally intended by Congress.

We believe conservation of our fish and wildlife resources, particularly protecting and recovering endangered species, is at the core of our American values. The current version of ESA accomplished much, and we should be proud of this. But we can't afford to let ESA rest on its laurels and continue to decline. The time is ripe for ESA to be upgraded to a more cooperative model, and we are hopeful for strong bipartisan support to move this forward.

Thank you, and I welcome your questions.

[The prepared statement of Mr. Wiley follows:]

Senator Barrasso. Well, thank you so much for your thoughtful testimony.

I would like to now turn to Mr. Larry Voyles, who is the Director of the Arizona Game and Fish Department and the former President of the Association of Fish and Wildlife Agencies.

Thank you for joining us, Mr. Voyles.

STATEMENT OF LARRY VOYLES, DIRECTOR, ARIZONA GAME AND FISH
DEPARTMENT

Mr. Voyles. Thank you, Chairman Barrasso and Ranking Member Carper. I am Larry Voyles, and I am pleased to be here speaking to you today as Director of Arizona Game and Fish.

My career has put me in a position that I believe enables me to shed light on some important aspects of the Endangered Species Act. I have gained the insights through a 42-year career with the Department, including 9 years as Director, and I served under three governors from both sides of the aisles, both Republican and Democrat.

I have also served as past President of the Association of Fish and Wildlife Agencies. I am a charter member on the State and Federal Joint Task Force on ESA Administration. I serve a special detail to the U.S. Fish and Wildlife Service, and I am a member of the Office Strategy Team that convened legal scholars to recommend enhancements to the ESA that would significantly improve conservation of imperiled species, and hopefully so dramatically that bipartisan support in Congress can be assured.

Scholars first surveyed State directors, assessing their willingness to be more deeply involved in ESA administration, and in that survey more than 90 percent of directors surveyed overwhelmingly affirmed their willingness. ESA is an essential tool to conserve America's imperiled wildlife. It is an Act,

however, that shows its age. It is time to modernize the Act to take advantage of the unparalleled conservation capacity of most of today's State fish and wildlife agencies.

My experience with the ESA tells me that it is critically important that we strengthen the provisions in Section 6 of the ESA. Section 6 states, "In carrying out the program authorized by this Act, the Secretary shall cooperate to the maximum extent practicable with the States." Those are clear and straightforward words, but, as you will note in my written testimony, not so simple in practice. Nearly 44 years after enactment, Federal agencies still have not promulgated rules to guide in administering these simple phrases.

Now, what is it about that that I think makes it so important? It is important for us to foster cooperation intended by Section 6 because State fish and wildlife agencies bring a wealth of resources and authorities that enable us to conserve endangered species far more effectively when that cooperation can be optimized.

For a moment, please consider what makes this true. Consider that the importance of the States to effectively care for our Nation's threatened and endangered species can be evaluated two ways: quantitatively and qualitatively. This may sound a little repetitive because the Chairman already visited these numbers, but, quantitatively, the resources provided by

States collectively are impressive and factually eclipse that of their Federal partners, demonstrated by the following figures:

State and wildlife agencies own, manage, or administer conservation on more than 464,000,000 acres of land and 167,000,000 acres of lakes, reservoirs, and wetlands; State and wildlife agencies employ nearly 50,000 people and leverage the efforts of 190,000 volunteers; States employ 11,000 wildlife biologists - that is nearly the entire workforce of the U.S. Fish and Wildlife Service - and 10,000 wildlife enforcement officers; nearly 6,000 of our employees hold advanced degrees; and States' collective budgets contributes \$5.6 billion towards wildlife conservation annually.

Qualitatively, States have achieved unrivaled successes and are crucial to accurate decision-making in all phases of endangered species conservation. This can clearly be seen in one example from my State. The Arizona Game and Fish Department collected data and published peer-reviewed papers on Sonoran Desert tortoises for nearly 30 years. Contrary to claims in listing petitions, our quality data and expertise established an accurate picture of Desert tortoise conservation needs while delivering conservation actions precluding the need for listing the species. This reduced regulatory impacts to much of Arizona's landscape.

Another prime example of the multitude of State-led efforts

is the Lesser Prairie Chicken conservation program in five western States administered by the Western Association of Fish and Wildlife Agencies. Voluntary cooperation of States, landowners, land management agencies, and industry has conserved 16 sites, totaling 133,000 acres. The species populations are stabilizing and the endowed funding exceeds \$50 million.

My professional experience spending virtually the life of the ESA shapes my final thought. The ESA is an important tool for conserving America's imperiled wildlife that has become stagnant and needs modernizing. Neither Federal nor State agencies alone can meet the conservation challenges we face. States must have the opportunity to elect participation in listing decisions, recovery planning and implementation, developing private landowner conservation incentive programs, and decisions to down-list or de-list species. Only our working together under an ESA that mandates effective cooperation with States delivers the capacity needed to conserve imperiled species into the future.

Thank you.

[The prepared statement of Mr. Voyles follows:]

Senator Barrasso. Well, thank you so much for being with us today and for your testimony.

I would like to next turn to Janet Coit, who is the Director of the Rhode Island Department of Environmental Management.

Thanks so much for being with us today. Welcome to the Committee.

STATEMENT OF THE HONORABLE JANET COIT, DIRECTOR, RHODE ISLAND
DEPARTMENT OF ENVIRONMENTAL MANAGEMENT

Ms. Coit. Good morning, Chairman Barrasso and members of the Committee. It is good to be here. My name is Janet Coit and I am the Director of the Rhode Island Department of Environmental Management. We oversee the fish and wildlife agency and also have authority over all of the environmental protection and natural resource laws. I have worked under two governors and been the Director for six years, and am proud to now work for Governor Gina Raimondo.

Testifying before the Senate Environment and Public Works Committee today is really an honor and a little bit surreal. I worked as a professional staff member and the counsel for the Committee many, many years ago, leaving 20 years ago, right when this Committee was about to report out the Kempthorne-Chafee-Baucus-Reid Endangered Species Recovery Act. And even though that was two decades ago, I just wanted to spend a few moments talking about that experience, and I think it does bear looking at that bill, S. 1180.

That was reported by a bipartisan vote of 15 to 3 after a very extensive process. We had three years of negotiations and hearings. It was wonderful to work for Senator John Chafee, who was the fantastic Republican Chairman of this Committee who held conservation values very dear. He liked to quote Yogi Berra,

and he would say "you can see a lot by looking," and, given that philosophy, we did many, many field hearings.

And we went to Wyoming and talked to ranchers about black-footed ferrets; we traveled with John Turner, who was the Director of the U.S. Fish and Wildlife Service. We went and met power companies and timber companies. We talked to farmers and ranchers and took a look at what was actually happening, and it was very, very clear then, and is now, that the Endangered Species Act has a very different impact and reputation in different regions of this Country.

So I am pleased to give you the Rhode Island perspective, and also my perspective, which is a different one; it is one of a policy staffer for the EPW Committee who now is overseeing a State agency with considerable budget constraints, a very important and critical mission, and really the need to have public engagement and buy-in if we are going to be successful.

So turning to some of the major points I want to make. The time is moving too fast here. So, first, strong Federal role, critical. Until the Endangered Species Act was enacted in 1973, signed into law by Richard Nixon, we didn't have a really strong set of legal authorities to protect threatened and endangered species, so that Act is really one of the finest conservation laws in the world and has had many, many successes. And it is critical to have that Federal backstop to ensure that, whatever

happens, we know we have authorities to protect threatened and imperiled species.

So I just want to say that I know everyone here and my comments, too, are about making the Act more successful. More successful for conservation, more successful for State agencies. We are all geared towards doing that and there is a tremendous workload, and it would be wonderful if you could have a bipartisan bill as you did 20 years ago.

I think this Committee is known for working through intractable issues with respect and I think that a lot of work will be needed in order to get a bipartisan Endangered Species Act modernization bill, but that it is possible if people are very thoughtful and take a look at how this Act touches down so that we don't undermine some of the work that is needed in places like Rhode Island in the northeast while we listen to some of the experiences from the west.

The next point I want to make is just to endorse the need for strong State agency engagement. We are the boots on the ground. Our biologists are foresters, and we are intermittently involved in the community, so we know both the conservation and the science, but also the industries and the companies, the landowners that we need to work with. So full participation and engagement of the State agency is critical in listing decisions, in recovery plans, in monitoring, in outreach, in collaboration.

And I can say that in the northeast, with Region 5, we have a very close working relationship, and that gets me shortly to my point about the New England Cottontail. But Wendi Weber, the head of Region 5, has been terrific at reaching out to the States to collaborate.

Adequate resources. I won't repeat what my colleagues have said, but the adequate resources for conserving species are critical to any reforms, and an ounce of prevention is worth a pound of cure. We all want to keep species from getting on the list. That is the success. And once on, getting them off.

So I want to again mention the State wildlife action plans. We put a tremendous amount of working into those, working with stakeholders, and they are really serious science-based documents with lists of critical species and with strategies, and they help us spend resources wisely. So the States have those plans. Unfortunately, at least in my State of Rhode Island, we don't really have sufficient resources to carry them out.

Let me just summarize one last point. The New England Cottontail is a great example of how an imminent listing motivated people to get together really coordinated or kicked off by the U.S. Fish and Wildlife Service, but then with the States as equal partners, the Wildlife Management Institute administered the process, and by doing that we were able to take

a species that was about to be listed, that had lost 86 percent of its habitat, and prevent it from being listed so that Secretary Jewell was able to announce that listing was not warranted.

And we have a whole cadre of private landowners, partners, and excited folks who are working together on conserving the New England Cottontail, and we have captive breeding programs, and we are seeing that species, and the 65 other species that depend on that young forest habitat, flourish because of the way we worked collaboratively across many States.

Then I will just end by saying what you have so many times in this Committee, that one size does not fit all. We are very resource-constrained. Fortunately, the sportsmen and women of this Country have seen to it that we have funding for game species. It has been decades that we have been looking for an adequate source of funding for non-game species.

In a State like mine, 80 to 85 percent of the funds we have are already restricted to game species. It is very difficult to find the resources to put towards our engagement with the Endangered Species Act or the whole host of non-game species that are under our authority and stewardship as a State agency.

So thank you. I look forward to any questions, and thank you very much for having me.

[The prepared statement of Ms. Coit follows:]

Senator Barrasso. Well, thank you. We appreciate you being here.

For my colleagues on the Committee, since the Democrats have brought into play the two-hour rule, we are going to have to adjourn at 11:30, which gives each of us time for questioning. But to make sure each of you have the time, I will turn to Senator Inhofe first and I will reserve my time.

Senator Inhofe. Thank you, Mr. Chairman. I appreciate that.

Let me remind you, Director Coit, that the experiences that you shared with us 20 years ago with John Chafee, that was my first year. He also came to Oklahoma, if you remember, and studied our system. So you are right, he had eyes on all the time.

Director Voyles, you are the guy that brought up the Lesser Prairie Chicken. You know, we had the wide conservation plan, five States. Oklahoma, my State was one of those States. And we worked hard. We worked for a long period of time. We had meetings in all five of the States and we came up with some conclusions as relates to the Lesser Prairie Chicken. And even though we went through all that work, in fact, we went through so much work that a Texas court came in and said that the fish and wildlife was violated because they didn't consider properly the conservation plan that was put forward. So right now we are

in the process of looking at this and seeing what we can do.

But there doesn't seem to be any incentives for people to really work with these conservation efforts. I would like to have you give us your opinion as to the seriousness of that particular conservation effort and why they are not incentivized in our system to participate.

Mr. Voyles. Senator Inhofe, Senator Barrasso, the Lesser Prairie Chicken, I think, is the classic example of what States can do when they integrate together and work with partners both in the private sector as well as the public sector. It is plowing ground to the future, I think of the way conservation will be done. Fifty million dollars of investment, hundreds of thousands of acres of lands and road, and yet there was a finding by the U.S. Fish and Wildlife Service that the species needed to be listed. The courts disagreed with that.

I would argue that the lack of a formal process for the States to be at the table in the decision process for listing leaves a hole, and I think there is a certain balance value in having the State wildlife agency being able to be a part of that discussion.

Senator Inhofe. I think that Director Wiley suggested the same thing. I think that is well taken.

Director Wiley, did you want to comment in terms of some of the ideas you have? It is not real clear in your written

statement whether or not you had some type of a State intervention, a trigger point, where States would be involved and take over the function of the Federal Government. Is that accurate?

Mr. Wiley. Well, in a couple different ways, yes, sir. And I agree fully that States don't have enough of a formal role in the decision-making process. We do get involved early on and try to collaborate and partner, but then the curtain closes. And, the way things are constructed, we kind of have to sit outside and wait for decisions.

We believe one idea is right now we have classification where you have threatened species and endangered species. We believe the original intent was for once a species is no longer warranted for listing as endangered, it is changed to a threatened status, that the States should then take the lead in managing that species.

Senator Inhofe. Exactly. Which reminds me also in Oklahoma we have the American burying beetle, and it fits in the categories that should be. Fish and Wildlife seems to move the goalpost. They come out and say this is what we want to accomplish, and then, once you accomplish that, they move the goalpost, and that is one of the problems that we have.

In the case of the American burying beetle, its listing was only known to be in eastern Oklahoma and Block Island, Rhode

Island. So you are familiar with that also.

Now, since the listing, science has used all these things. The problems have been pretty much resolved. Now, I think that shows that, since the inception of the Endangered Species, there have been 1,652 listings and only 40 de-listed in terms due to recovery. So, to me, it shows that that system is broken.

And I think this hearing is really good. Already some really good recommendations have been made by this Committee. So we want to get through all of our questioners, but I really think, Mr. Chairman, this is going to be one of the real accomplishments of this coming year, something we have worked on for a long time, since I was there with John Chafee 20 years ago.

Thank you.

Senator Barrasso. Well, thank you, Senator Inhofe, for your ongoing leadership over the decades.

Senator Wicker.

Senator Wicker. Let me ask you about private landowners. Private landowners working with the U.S. Fish and Wildlife Service in partnership. Of course, our goal is to get all sides involved in working on ways in which we can accommodate private landowners and conserve species at the same time.

Mr. Wiley, do you think the Endangered Species Act needs clarity on the ability of the U.S. Fish and Wildlife Service to

work in partnership with private landowners in order to use innovative measures such as Memorandums of Agreement that do not require Federal Register notice, but are negotiated directly with landowners?

Mr. Wiley. Yes, sir, Mr. Chairman. Yes, sir. We feel like a lot of work could be done to clarify in the law the importance of private landowners and the importance of working with landowners to achieve conservation. The Fish and Wildlife Service does make an effort, and that should be applauded, but right now their hands are tied in many cases. Landowners view, in many cases, a listing as a very serious threat to how they use their land. We believe there is a lot better way forward if the States can be more engaged and more involved working on the ground, because we have those relationships and we feel like we can really be helpful.

Senator Wicker. Well, as I understand it, there are landowners in Mississippi with more than 4 million acres who are seeking to do this. In what ways are their hands tied?

Mr. Wiley. Well, first, there's a serious workload issue as far as just the time it takes when you have a willing coalition of landowners like these forestry landowners that want to sit down and say what can we do to take conservation measures and put in place now. There's a time lag. It takes years, in many cases, to develop, even when the parties are agreeable. It

just takes years to pull those things together just from a workload case; it's a time-consuming process. And beyond that, right now the administrative rules are kind of all over the board and are not very clear as far as what landowners can and can't do, and how the right type of conservation programs that can be put in place.

Senator Wicker. Is there some recommendation you would have to this Committee about streamlining the rules or making the process more efficient?

Mr. Wiley. Yes, sir. We have actually a suite of recommendations we believe that would really be helpful, particularly moving from rules to actual overarching legislation and law.

Senator Wicker. Okay. Now, you mentioned a backlog in that regard. What about the backlog of species petitions awaiting review by the U.S. Fish and Wildlife? Do you think 12 months is enough time to craft a U.S. FWS-approved voluntary conservation plan for interested stakeholders, for example?

Mr. Wiley. With current capacity, it is not for the volume that we are having to deal with, the Fish and Wildlife Service and NOAA Fisheries. It is not enough time.

Senator Wicker. What do you recommend?

Mr. Wiley. We recommend applying a workplan approach, a prioritization approach. But also actually looking at the

species that are being petitioned and the threats, and putting them in the proper order and priority. And some may take more time; some might be feasible to do more quickly. Right now it is just a shotgun, everything is coming all at once, and it is hard to handle it. And the Service has taken some steps in that regard, but we have some ideas on how to move that further along.

Senator Wicker. How do you set a different time on an ad hoc basis, though?

Mr. Wiley. I don't think it would be on an ad hoc basis. I think you could set it up, frame it up for the law to have some flexibility so that when the experts look at a species as it comes in, they can then make decisions about where it would fit into that framework of timelines.

Senator Wicker. Thank you very much.

And thank you, Mr. Chairman.

Senator Barrasso. Thank you, Senator Wicker.

Senator Rounds.

Senator Rounds. Thank you, Mr. Chairman.

First of all, let me just say that, after having had the opportunity to work as governor in South Dakota for eight years, I have a huge amount of respect for the individuals that work at the local level with regard to game and fish, recreational opportunities, management of those game species and no-game

species.

I look at the South Dakota Game Fish and Parks, and the amount of work that they have done and the amount of respect that they garner in the work that they do, and the cooperative way in which they try to put together local agreements with landowners, trying in an affirmative way to create good relationships so that the recreational opportunities of our citizens are enhanced and the availability to access private lands and so forth.

Along with that, they have that obligation and responsibility to work with the Federal Government and U.S. Fish and Wildlife Service to fulfill our responsibilities with regard to the Endangered Species Act, and I think they do a marvelous job of balancing those challenges.

I am just curious. Director Voyles, you said in your testimony that you explain that the authority of Section 6 cooperative agreements allows for States to have a greater or greater opportunities to participate in the implementation of the ESA. But you also mention that State agencies have not been able to exercise this authority due to misunderstandings and misinterpretation by the Federal Executive Branch agencies and courts.

Could you elaborate on how executive agencies and courts have misinterpreted Section 6 authority and how this has

impacted the ability of States to participate effectively in ESA implementation?

Mr. Voyles. Thank you, Senator Rounds, Mr. Chairman. What we found in the administration of Section 6 is the focus has primarily been, from the Federal agencies has primarily been on applying Section 6 to a shared funding opportunity, but not the full suite of opportunities for the States to participate at the table in collaboration on ESA-related decisions and processes.

As an example, during the 90-day petition review process, where they take a look to determine if a species warrants a further analysis and a 100-day recommendation of other lists or not, State data, unless it is conveyed and in the files of the Federal agencies beforehand, the courts have ruled they cannot access that data and information from the States. Clearly, the intent of the ESA was that we would be working together collaboratively. Yet, we have a legal determination that we cannot.

There is no hardwiring of the States in terms of our ability to participate on recovery teams and recovery planning. That is a decision at the will of the U.S. Fish and Wildlife Service, as to whether they include a representative from the State; and they will make the determination who that representative will be. That is not really the full relationship that was envisioned, I don't believe. I believe

Section 6 was intended to be the balancing of the 10th Amendment concerns and issues of the States, and it is not functioning that way.

Senator Rounds. Thank you.

Mr. Chairman, just in the interest of time, I will yield back the remaining part of my time.

Senator Barrasso. Thank you very much.

Senator Capito.

Senator Capito. Thank you, Mr. Chairman. I will just ask one question here that I am interested in.

I am interested in the topic is sort of the consistency with which the Fish and Wildlife enforce and makes specific actions. We all realize States are different, but in our State we have had some concerns from our State regulators that Fish and Wildlife has been inconsistent in its approach for requiring habitat protections in the State, even compared with what they are doing in other States. And, in particular, rather than going through the formal rulemaking to designate critical habitat, they have been establishing buffer zones. And these buffer zones are critical habitat in all but name, but they haven't been through the subject of the formal rulemaking, public notice, or comment.

As a result, it is unclear, the footprints are unclear. There has been no consideration for the economic impact and even

has impacted some of our ability to do some reclamation activities.

I am just wondering have either or all three of your States had that inconsistency and have you had this issue with buffer zones being created instead of critical habitat?

Ms. Coit. I will start and say, no, we haven't had that experience. If I can harken back to the New England Cottontail example, that was an example where up front there was an agreement on conservation on the ground and what we would all strive to do. And the NRCS is actually the Federal agency that is helping us work with private landowners and doing those agreements rather quickly, and I think that is because we set out in advance, working collaboratively equally with the U.S. Fish and Wildlife Service on what the goals would be. So I would say our experience in Rhode Island is a very collaborative experience with the U.S. Fish and Wildlife Service, and NMFS, as well.

Senator Capito. And consistent? Either of the two? Yes, Mr. Voyles.

Mr. Voyles. In Arizona, we have not had the experience with buffers, but what we have had is we have had an application of principles applied to how we can manage or deal with a given species that varies and is sometimes diametrically opposed to what is allowed for another species. So species-to-species

there are inconsistencies in the way the rules are applied.

Also, we have had situations where the Colorado River is a major dividing line between regional offices for U.S. Fish and Wildlife Services, so Region 2 is on the east side of the river and Region 8 is on the west side of the river. And we have had opposing decisions on what we can do as far as stocking rainbow trout ruled by one office in the same water that is being ruled the other way by the other office. So there are geographic inconsistencies, but right up on the same river.

Senator Capito. On the same river.

Mr. Wiley?

Mr. Wiley. Yes, Mr. Chairman. Yes, I would say that we haven't had that buffer experience, but we have seen how things are different in different parts of the Country in different States. To me, one way to help is, because how well States collaborate with each other and we share information, I think having a seat at that table, being there when that decision was made to consider buffers versus critical habitat as a workaround, maybe, I think we would have called them on that and we would have been there saying there is a better way. So that is why we are looking for more of an open door there.

Senator Capito. All right. Thank you.

Thank you, Mr. Chair.

Senator Barrasso. Thank you, Senator Capito.

Senator Ernst.

Senator Ernst. Thank you, Mr. Chair.

Mr. Voyles, in your testimony you spoke about the importance of State agency participation in the implementation of ESA, and over the years, despite their on-the-ground experience and expertise, States have not always had as much say in the process as they would have liked. From your time at the Game and Fish Department, can you provide an example of a time when both a species and stakeholders would have been better served had the Federal Government taken more State data or recommendations into account?

Mr. Voyles. Thank you, Senator Ernst, Mr. Chairman. I can think of several instances. One example would be a very politically divisive recovery effort, the Mexican wolf. There has been a 25-year effort to revise the recovery plan for Mexican wolf. The original recovery plan was developed in the 1980s and it is outdated.

It has been extremely politically divisive, and in the process, at one point in time, we had to fight for a seat at the table to be a part of the recovery plan process. And when we were fighting for that seat, the recovery team that was convened, the Science and Planning Subgroup, had no ungulate biologist on the team. There was nobody that understood population dynamics for the prey species that those wolves would

have depended upon. That is what we do for a living; we had the expertise. And we ultimately got a seat, but we had to fight our way in. It was not easy.

That should be a hardwired event. We shouldn't have to try and fight a way in and bring political pressure to bear to be able to get a seat at that table. And it was important that we were there because some of the population dynamics they were pursuing would have failed. There simply wasn't the prey base to be able to support the kind of wolf numbers that they were talking. So that is an example of having to kind of scratch and claw to get in, as opposed to being a full partner, as envisioned in Section 6.

Senator Ernst. So you think that just by having the State involved from the very beginning in those discussions, that a lot of conflict would have been avoided and perhaps a better plan would have been put in place?

Mr. Voyles. Absolutely. And we still don't have a revised plan. Now, we do have a full seat at the table now, it has been reconstituted, and I think we have more powerful science coming to bear now. We have improved their modeling a great deal by bringing State scientists into the picture and I think we have a lot, hopefully a better trajectory on the next route, on a final hope for a revision. I think that could have reduced this 25-year timeline by orders of magnitude.

Senator Ernst. Thank you. I appreciate that and I do think States should be involved, especially when they have the expertise actually in dealing with a certain species.

Ms. Coit, in your testimony you also emphasize the importance of State fish and wildlife agency participation in ESA implementation. You noted that conservation efforts would be aided by increasing the utilization of data from State agencies. Are Federal partners ignoring or are they choosing not to use State data in favor of their own data?

Ms. Coit. We have recently had a very good experience. I think it has evolved and improved over time. So the U.S. Fish and Wildlife Service and NMFS is using State data and we are sharing data. I think they are extremely open to that in Rhode Island and we have had that experience, but it has gotten better over time, according to my staff. In some areas we have the capacity and expertise, and in other areas we don't; it might be a university or another entity. So I think we are all wanting the absolute science to come into the process so the decisions can be made on science.

Senator Ernst. So is there a lack of communication in those examples?

Ms. Coit. I am bringing the Rhode Island experience. We have a very good working collaborative relationship with the U.S. Fish and Wildlife Service and NMFS. A lot of our

endangered species conflicts are in the marine environment.

Senator Ernst. Okay. Fantastic.

I will yield back my 17 seconds, Mr. Chair. Thank you.

Senator Barrasso. Thank you very much, Senator Ernst.

In the little time that is left, Director Wiley and Voyles, at our hearing in February, Gordon Myers, the Executive Director of the North Carolina Wildlife Resources Commission, who also served as President of the AFWA's southeastern association, he testified that State governments have enhanced their capacity really over the past 30 years to make greater contributions to implementation of the Endangered Species Act.

Do you agree with Director Myers that States are in a much better position today than they have ever been before to contribute to the conservation and recovery of the species under the Endangered Species Act?

Mr. Wiley. Mr. Chairman, we absolutely do. There are States that are still working to get there. We are all working to do better, but if you look at the transition and transformation of State fish and wildlife agencies over the last 20, 30 years, it is amazing what we can do and what we are doing, and I really think now is the time to give some regard to that.

Senator Barrasso. Thanks.

And Mr. Voyles?

Mr. Voyles. Mr. Chairman, if you noted on my bio, I started in professional wildlife conservation the year after ESA was implemented, and at that time we had one biologist on staff that was what we called a non-game biologist. I have over 100 people now on staff that deal with conservation of non-hunted and non-fish species. Clearly, Arizona has grown exponentially in our ability to deal with ESA-listed species, as well as species at risk.

The other thing that I want to point out is State wildlife agencies are an incubator of innovation, and some of the innovative solutions that are taking place, and I think the Lesser Prairie Chicken example really highlights that, there is a \$50 million endowment that has been built by partnerships with industry.

Some of those States, if you were to ask what is your appropriation for endangered species, they might not look so spectacular, but they have generated an endowment through partnerships that enables them to be very effective. In our State, we have contracts operation where we are able to deal with species outside of our appropriation methodology through contracts that range \$7 million to \$10 million a year of revenue streams for unique operations.

So that kind of innovation is coming out of the States and we are really, I think, at the cutting edge of public-private

partnership in America.

Senator Barrasso. Well, our time has expired.

Ms. Coit, I had a question for you, but I am not going to go beyond the rules of the Senate. It has to do with how much money is available and the impact of the Equal Access to Justice Act, the book, Inside the Equal Access to Justice Act, where Lowell Baier talks about just how much money of Federal taxpayer dollars is spent per year on environmental litigation relating to the Endangered Species Act, and it sounds like how little money you get, and how we can best make sure that the money goes in the right direction. But I will submit that question to you in writing, consistent with the rules of the Senate.

This hearing is now adjourned. Thank you.

[Whereupon, at 11:31 a.m. the committee was adjourned.]